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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Daniel Logan Tapia,  
10 Petitioner,  
11 vs.  
12 Charles Ryan, et al.,  
13 Respondents.  
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No. CV 13-00113-TUC-BPV

**ORDER**

15 On February 22, 2013, Petitioner, Daniel Logan Tapia, confined in the Arizona  
16 State Prison Complex – Yuma, filed a *pro se* Petition for Writ of Habeas Corpus pursuant  
17 to Title 28, U.S.C. § 2254. (Doc. 1)<sup>1</sup> Respondents have filed an answer to the petition  
18 (“Answer”) with exhibits A through G attached. (Doc. 9). Petitioner did not file a reply.  
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20 In accordance with the provisions of Title 28, U.S.C. § 636(c)(1), all parties  
21 consented to proceed before a United States Magistrate Judge to conduct any and all  
22 further proceedings in this case, including trial and entry of a final judgment, with direct  
23 review by the Ninth Circuit Court of Appeals if an appeal is filed. (Doc. 14.)  
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25 For the reasons discussed below the Court denies the Petition and dismisses this  
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28 <sup>1</sup> “Doc.” refers to the documents in this Court’s file.

1 case with prejudice.

2 **I. FACTUAL AND PROCEDURAL BACKGROUND**

3 On September 15, 2011, a grand jury indicted Petitioner on five drug related  
4 charges for offenses committed in August and September, 2011. Ex. B.<sup>2</sup> Petitioner and  
5 trial counsel appeared in court on January 10, 2012 for a pretrial conference, at which  
6 time Petitioner's counsel informed the court that there had been a plea offer and requested  
7 that the Court proceed with a *Donald*<sup>3</sup> hearing. Ex. C. Consequently, counsel for the State  
8 explained the terms of the offer and the "exposure" to Petitioner if he accepted the plea  
9 agreement. *Id.* The Court addressed Petitioner regarding the plea offer and the range of  
10 sentencing and requirement that a fine be imposed. *Id.* The Court further addressed  
11 Petitioner regarding the consequences of going to trial and the range of sentencing if  
12 Petitioner went to trial and lost. *Id.* Petitioner affirmed his understanding of the offer. *Id.*

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16 On January 23, 2012, Petitioner accepted the State's offer and entered a plea of  
17 guilty to the knowing sale of methamphetamine. (Exs. D, E.) In exchange, the State  
18 dismissed four additional drug-related charges. (Exs. B, D.) On February 21, the trial  
19 court imposed a 9-year flat time sentence, as specified by the plea agreement. (Exs. D, F.)  
20 Petitioner acknowledged that he received a copy of the Notice of Rights of Review after  
21 Conviction but did not file anything in the state courts challenging his conviction or  
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25 <sup>2</sup> The exhibits in this order refer to the exhibits attached to Respondent's Answer  
26 (Doc. 9) unless otherwise indicated.

27 <sup>3</sup> Arizona courts conduct a *Donald* hearing to ensure the defendant has been  
28 informed of the content of the State's plea offer, where one had been made, and that the  
defendant understands the consequences of a decision to reject the offer. *See Arizona v.*  
*Donald*, 198 Ariz. 406 (App. 2000).

1 sentence. *See* Ex. G and Petition, at 5-7.

2 Petitioner's habeas corpus petition raises two grounds in support of his request for  
3 habeas relief:

4 (1) Petitioner was denied effective assistance of counsel in violation of the  
5 Sixth Amendment; and  
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7 (2) Petitioner's Fourth Amendment rights were violated when evidence from  
8 an illegally monitored phone was used against him and when he was  
9 wrongfully identified as the person being monitored.  
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11 Respondents argue that the Petitioner has procedurally defaulted his claims by  
12 failing to raise them in the state courts, and any return to state court to raise them now  
13 would be futile. Answer at 6-7.  
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## 15 **II. DISCUSSION**

### 16 A. The petition is timely.

17 A one year period of limitation shall apply to an application for writ of habeas  
18 corpus by a person in custody pursuant to the judgment of a State court. 28 U.S.C. §  
19 2244(d)(1).  
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21 Under the AEDPA, a state prisoner must generally file a petition for writ of habeas  
22 corpus within one year from "the date on which the judgment became final by the  
23 conclusion of direct review or the expiration of time for seeking such review[.]" 28  
24 U.S.C. § 2244(d)(1)(A).  
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26 Petitioner had until one year after his conviction and sentence became final to file  
27 his federal petition. Respondents do not contest the timeliness of the Petition. Upon  
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1 review of the state-court record, the Court finds that, pursuant to the AEDPA, the Petition  
2 is timely.

3 B. The claims in the Petition are not exhausted.

4 A writ of habeas corpus may not be granted unless it appears that a petitioner has  
5 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*  
6 *Thompson*, 501 U.S. 722, 731 (1991). To exhaust state remedies, a petitioner must “fairly  
7 present” the operative facts and the federal legal theory of his claims to the state's highest  
8 court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848  
9 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277–  
10 78 (1971).

11 “To exhaust one’s state court remedies in Arizona, a petitioner must first raise the  
12 claim in a direct appeal or collaterally attack his conviction in a petition for post-  
13 conviction relief pursuant to Rule 32 [Arizona Rules of Criminal Procedure].” *Roettgen v.*  
14 *Copeland*, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994). The failure to exhaust subjects the Petitioner to  
15 dismissal. *Gutierrez v. Griggs*, 695 F.2d 1195 (9<sup>th</sup> Cir. 1983). Petitioner states that he has  
16 not presented his claim to the Arizona Court of Appeals and his Petition makes clear that  
17 he has not attempted to avail himself of any state court remedies. Thus, the claims are not  
18 exhausted.

19 C. The claims are procedurally defaulted.

20 A habeas petitioner's claims may be precluded from federal review in two ways.  
21 First, a claim may be procedurally defaulted in federal court if it was actually raised in  
22 state court but found by that court to be defaulted on state procedural grounds. *Coleman*,  
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1 501 U.S. at 729–30. Second, a claim may be procedurally defaulted if the petitioner failed  
2 to present it in state court and “the court to which the petitioner would be required to  
3 present his claims in order to meet the exhaustion requirement would now find the claims  
4 procedurally barred.” *Coleman*, 501 U.S. at 735 n. 1; *see also Ortiz v. Stewart*, 149 F.3d  
5 923, 931 (9<sup>th</sup> Cir. 1998) (stating that the district court must consider whether the claim  
6 could be pursued by any presently available state remedy). If no remedies are currently  
7 available pursuant to Rule 32, the claim is “technically” exhausted but procedurally  
8 defaulted. *Coleman*, 501 U.S. at 732, 735 n. 1; *see also Gray v. Netherland*, 518 U.S.  
9 152, 161-62 (1996).

12 In Arizona, claims not previously presented to the state courts on either direct  
13 appeal or collateral review are generally barred from federal review because any attempt  
14 to return to state court to present them would be futile unless the claims fit into a narrow  
15 range of exceptions. *See* Ariz.R.Crim.P. 32.1(d)-(h), 32.2(a) (precluding claims not raised  
16 on direct appeal or in prior post-conviction relief petitions), 32.4(a) (time bar), 32.9(c)  
17 (petition for review must be filed within thirty days of trial court’s decision). Petitioner’s  
18 claims do not fit within any exception and, therefore, return to the state courts would be  
19 futile and the claims are barred from federal review. *Stewart*, 536 U.S. at 860; *Ortiz v.*  
20 *Stewart*, 149 F.3d at 931-32 (Rule 32, Ariz.R.Crim.P. is strictly followed); *State v. Mata*,  
21 916 P.2d at 1050-52 (waiver and preclusion rules strictly applied in PCR proceedings).  
22 These claims are “technically exhausted” but procedurally defaulted.

26 Because the doctrine of procedural default is based on comity, not jurisdiction,  
27 federal courts retain the power to consider the merits of procedurally defaulted claims.  
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1 *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a  
2 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the  
3 failure to properly exhaust the claim in state court and prejudice from the alleged  
4 constitutional violation, or shows that a fundamental miscarriage of justice would result if  
5 the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.  
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7 Cause is defined as a "legitimate excuse for the default," and prejudice is defined  
8 as "actual harm resulting from the alleged constitutional violation." *Thomas v. Lewis*, 945  
9 F.2d 1119, 1123 (9<sup>th</sup> Cir. 1991); *see Murray v. Carrier*, 477 U.S. 478, 488 (1986) (a  
10 showing of cause requires a petitioner to show that "some objective factor external to the  
11 defense impeded counsel's efforts to comply with the State's procedural rule"). Prejudice  
12 need not be addressed if a petitioner fails to show cause. *Thomas*, 945 F.2d at 1123 n.10.  
13 To bring himself within the narrow class of cases that implicate a fundamental  
14 miscarriage of justice, a petitioner "must come forward with sufficient proof of his actual  
15 innocence" *Sistrunk v. Armenakis*, 292 F.3d 669, 672-73 (9<sup>th</sup> Cir. 2002) (internal  
16 quotation marks and citations omitted), which can be shown when "a petitioner 'presents  
17 evidence of innocence so strong that a court cannot have confidence in the outcome of  
18 the trial unless the court is also satisfied that the trial was free of nonharmless  
19 constitutional error.'" *Id.* at 673 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)).  
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24 Petitioner filed no reply but explained why he did not appeal, stating that that he  
25 had "signed plea." Petition at 5. Arizona, however, provides a specific remedy to  
26 defendants who plead guilty in the form of an of-right petition for post-conviction relief,  
27 pursuant to Arizona Rule of Criminal Procedure 32.1. In fact, Petitioner signed a form  
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1 entitled “Notice: Right to Review after Conviction,” that informed him of his rights under  
2 Rule 32. *See* Ex. G.<sup>4</sup> The trial court also advised Petitioner of his right to review at the  
3 time of his sentencing hearing. Ex. F. at 5. Petitioner’s alleged ignorance of Arizona  
4 judicial procedures is not sufficient cause for his failure to exhaust his claims. *See*  
5 *Hughes v. Idaho State Board of Corrections*, 800 F.2d 905, 908–09 (1986) (petitioner’s  
6 pro se status, release of inmate assistant, and illiteracy not cause); *Tacho v. Martinez*, 862  
7 F.2d 1376, 1381 (9<sup>th</sup> Cir. 1988) (mental state of pro se petitioner and incompetent  
8 jailhouse lawyer not cause); *see also Kibler v. Walters*, 220 F.3d 1151, 1153 (9th Cir.  
9 2000) (ignorance of state law no excuse). Because Petitioner failed to show cause,  
10 prejudice need not be addressed. *Murray*, 477 U.S. at 488. Nor does he claim or show  
11 actual innocence. Because Petitioner has shown neither cause nor prejudice, nor actual  
12 innocence, to excuse his failure to exhaust his claims in the state courts, this Court cannot  
13 address them. *Murray*, 477 U.S. at 488; *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9<sup>th</sup>  
14 Cir. 2003).

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19 Accordingly,

20 IT IS ORDERED as follows:

21 (1) The Petition for Writ of Habeas Corpus (Doc. 1) is DENIED and this case  
22 is dismissed with prejudice.  
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25 <sup>4</sup> The Notice of Rights of Review after Conviction states: “YOU DO NOT HAVE  
26 A RIGHT TO APPEAL IF YOU HAVE PLED GUILTY OR NO CONTEST OR HAVE  
27 ADMITTED TO A VIOLATION OF CONDITIONS OF PROBATION. IN THAT  
28 CASE, RELIEF MAY BE SOUGHT ONLY BY PETITION OR POST-CONVICTION  
RELIEF. Rules 17.1, 17.2 and 27.8, Rules of Criminal Procedure, A.R.S. § 13-4033(B).”  
Ex. G.

(2) The Clerk of the Court shall enter judgment accordingly and close the file in this matter.

(3) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court declines to issue a certificate of appealability because reasonable jurists would not find the Court’s procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Dated this 7th day of May, 2014.

  
Bernardo P. Velasco  
United States Magistrate Judge